UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

WHDH-TV

And

Case No. 1-CA-46744

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, BOSTON LOCAL

Don C. Firenze, Esq., Counsel for the General Counsel James A.W. Shaw, Esq., Counsel for the Union Robert P. Joy, Esq. and Sean P. O'Connor, Esq. Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Boston, Massachusetts on February 27, 2012. The Complaint essentially alleges that during the hiatus period between the old and new collective bargaining agreements, the Respondent failed to comply with the old contract's dues check-off provisions.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. Jurisdiction

The Complaint alleges, the Answer admits and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice

The facts are not in dispute.

Since at least 1980, the Union and the Employer have had a collective bargaining relationship covering all persons, staff and freelance, who perform before the microphone or camera for the Employer. The relevant contract expired on December 31, 2008 but was extended by the parties until April 26, 2010. The contract, at Article 17, contained a dues check-off clause. It was stipulated that the Respondent ceased complying with the check-off provision on March 30, 2011 and that it resumed checking off and remitting dues to the Union on August 22, 2011. At a later point, the parties entered into a new contract.

It was agreed that during the hiatus period between the contracts, there were 22 employees who had current dues check-off authorizations and for whom the Respondent did not deduct dues from their pay or remit dues to the Union. One employee, Jonathan Hall, paid his dues directly to the Union.

The General Counsel concedes that under existing law, I should find that the Respondent did not violate the Act. The General Counsel is seeking to change the law. The Union argues an alternative position, which is that because the Employer waited for a long time after the contract's expiration before refusing to enforce the check-off provision, it had acquiesced in its continuation after expiration. It therefore argues that the Employer had tacitly agreed to continue it during the hiatus period.

In *Bethlehem Steel Co.* 136 NRB 1500, 1502 (1962) enf. denied on other grounds, 320 F.2d 615 (3rd Cir. 1963), the Board held that union security and dues check-off contact provisions do not survive the expiration of a collective bargaining agreement. There has been a good deal of recent debate among Board members as to whether this view of the law should remain valid and this has been expressed in a series of cases involving *Hacienda Hotel Inc. Gaming Corp.*, *d/b/a Hacienda Resort Hotel & Casino*. ¹

All of the parties made interesting arguments as to why the rationale cited in *Bethlehem Steel* should either be sustained or overruled. But as I am required to follow existing Board law,² these arguments have to be addressed to the Board itself.

I am also unpersuaded that the Union's alternative theory has merit. Under current law, a union security clause and a concomitant dues check-off clause requires, pursuant to Section 8(a)(3), the existence of a collective bargaining agreement containing a provision consistent with what is permitted under that section of the statute. Here, the contract expired and during the hiatus, the Company ceased, for a period of time, to comply with the dues check-off provision of the expired agreement. There is no evidence that the Company made any agreement, express or implied, to extend that contract provision after the expiration date in the absence of a new collective bargaining agreement. I do not conclude that the mere fact that the Respondent continued for some time after the contract's expiration to deduct and remit dues should be construed either as some kind of "waiver" or some kind of tacit agreement. See *Tribune Publishing Co.*, 351 NLRB 196 (2007) enfd. 564 F.3d 1330 (D.C. Cir. 2009).

In light of the above, I conclude that the Respondent has not violated the Act.

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¹ The initial Hacienda case is reported at 331 NLRB 665 (2000) which was remanded in *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 584-85 (9th Cir. 2002). A later decision was issued by the Board at 351 NLRB 504 (2007) and this also was remanded. The final Board decision in this series was reported at 355 NLRB No. 154 (2010). That decision was split 2 to 2 on the relevant issue.

² Waco Inc., 273 NLRB 746, 749 fn. 14 (1984).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: $^{\rm 3}$

5		ORDER	
	The Complaint is dismissed.		
10	Dated, Washington, D.C., April 11, 2012.		
		Raymond P. Green Administrative Law Judge	
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³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.